

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE
KENT COUNTY COURTHOUSE
DOVER, DELAWARE 19901
PHONE: (302) 739-4618**

**CHARLES W. WELCH, III
JUDGE**

October 6, 2009

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Deputy Attorney General
Department of Justice
114 East Market Street
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108 East Water Street
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RE: State of Delaware v. Zakry T. Cisco
Case No.: 0808012567

Decision on State's Motion to Re-Open

Dear Mr. Cutrona and Mr. Beauregard:

BACKGROUND

Zakry T. Cisco ("Defendant") has been charged with a number of criminal offenses, including Resisting Arrest and Driving Under the Influence, from an incident that occurred on August 10, 2008, in Sussex County, Delaware. A trial was scheduled in the Sussex County Court of Common Pleas for December 10, 2008. A judge from another county appeared to preside over the case as the two Sussex County judges had recused themselves from hearing the matter. At trial, on December 10, 2008, the Defendant's charges were dismissed by the Court pursuant to Court of Common Pleas Criminal Rule 48(b) for the State's unreasonable delay in prosecuting the case. At the time, it did not appear as though the State had filed any Information with the Court formally charging the Defendant.

The State filed a Motion to Re-Open the defendant's case on December 17, 2008, as it discovered that the Court's docket indicates that the State had filed an Information charging the Defendant with the alleged criminal offenses against him on September 17, 2008. Additionally, the State discovered a copy of the Information for the Defendant's charges in its files back at its office. The Information does not show a date that it was "clocked-in" with the Court. However, it is dated as being executed by the Attorney General's Office on September 16, 2008.

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A hearing on the State's Motion was scheduled for August 4, 2009.¹ At the hearing, the State's allegations as contained in its motion were verified as fact. However, the Defendant objects to the re-opening of his case for two reasons. First, the defense contends that the State did not have a copy of the Information at court on the day of trial and, therefore, was not prepared to proceed. Thus, the Rule 48(b) dismissal of the case was appropriate. Second, the defense argues that the delay in hearing the charges against the Defendant has denied him his speedy trial rights.

DISCUSSION

A. Court of Common Pleas Criminal Rule 48(b) Dismissal

Court of Common Pleas Criminal Rule 48(b) provides that the Court may dismiss a charge against a defendant where there has been unnecessary delay in filing an Information against him. The Delaware Supreme Court has held that dismissal under Rule 48 for unnecessary delay requires that the delay must first be attributable to the prosecution and, second, such delay must have a prejudicial effect upon the defendant "beyond that normally associated with a criminal justice system necessarily strained by a burgeoning case load." *State v. McElroy*, 561 A.2d 154, 156 (Del. 1989).

In this case, Court records indicate that the Information was docketed on September 17, 2008. It is likely that the docketed Information was misfiled by Court personnel as it cannot be found in the Court's file for this matter. While the prosecution should maintain copies of the docketed Information and present a copy to the defendant and the Court, if requested, it appears that the prosecution did not delay in filing the Information. Therefore, the Court finds that the delay was not attributable to the prosecution and that the case should not be dismissed pursuant to Court of Common Pleas Criminal Rule 48(b).

B. Speedy Trial

The defense next contends that the delay in bringing the defendant to trial for the charges against him has violated the defendant's right to a speedy trial. The Sixth

¹ The delay in scheduling the State's motion was caused by difficulty in scheduling a rotation with judges from Kent County and Sussex County. The Kent County judge that dismissed the case had become the primary and, then, the sole Court of Common Pleas judge in Kent County due to the retirement of a colleague. Therefore, he needed to schedule a rotation for a judge from another county to hear Kent County matters when he appeared in Sussex County to hear matters there.

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Amendment of the United States Constitution² and Article I, Section 7 of the Delaware Constitution³ guarantee the right to a speedy trial for criminal offenses. This right protects not only a defendant's interests, but, those of the public, which is entitled to see swift and certain justice. *Middlebrook v. State*, 802 A.2d 268, 270 (Del. 2002). The only appropriate remedy for a violation of a defendant's right to a speedy trial is the dismissal of the charges against him. *Id.*

The Delaware Supreme Court has held that "[t]o determine whether [a defendant] was denied his right to a speedy trial, [the] Court must consider: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *Stovall v. State*, 1998 WL 138931, at *4 (Del. 1998), citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972). These four factors must balance in the defendant's favor to find an impingement of his right to a speedy trial. *Harris v. State*, 956 A.2d 1273, 1275-76 (Del. 2008).

1. Length of the Delay

The first *Barker* factor, the length of the delay, is the threshold factor to be considered by the Court. *Middlebrook*, 802 A.2d at 273-74. If it weighs in the defendant's favor, the Court must weigh the other factors. *Id.* If it does not weigh in the defendant's favor, the analysis is over.

A defendant's right to a speedy trial attaches at the moment of his arrest, indictment or information, whichever occurs first. *Id.* at 273. The Delaware Supreme Court has held that delays greater than one year are presumptively unreasonable. *Michaels v. State*, 970 A.2d 223, 233 (Del. 2009).

In the instant case, the defendant was arrested on August 10, 2008, and the matter has not yet proceeded to trial. This delay is in excess of one year and is presumptively unreasonable. Therefore, the Court finds that the first *Barker* factor weighs in the defendant's favor and will examine the remaining *Barker* factors.

² The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ." U.S. Const. amend. VI.

³ Article I, Section 7 of the Delaware Constitution provides: "In all criminal prosecutions, the accused hath a right to . . . a speedy and public trial by an impartial jury; . . ." Del. Const. art. I, § 7.

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2. Reason for the Delay

The Delaware Supreme Court has held that different weights are given to different reasons for delay. *Middlebrook*, 802 A.2d at 274. “A deliberate attempt by the State to delay the trial in order to hamper the defense weighs heavily against the State. A more benign reason for delay such as overcrowded courts weighs less heavily against the State.” *Barker*, 407 U.S. at 531. Nevertheless, the State is still held accountable for delays caused by the court. *Middlebrook*, 802 A.2d at 275.

There are two reasons for delay in this case. First, court error resulted in a failure to file the docketed Information, which caused the Court to dismiss this case in error. Second, difficulty in scheduling a trial judge delayed the hearing on the State’s motion to reopen the case. Although the delay in scheduling a trial in this case was not caused by any deliberate attempt by the prosecution to delay the case, delays caused by the Court weigh against the State. Therefore, the Court finds that this *Barker* factor also weighs in the defendant’s favor.

3. Defendant’s Assertion of His Right to a Speedy Trial

If and when a defendant asserts his right to a speedy trial weighs heavily in a court’s determination of whether a defendant’s speedy trial rights have been violated. *Id.* “Furthermore, the failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.” *Id.*

In examining this *Barker* factor, the Court notes that the defendant did not assert his right to a speedy trial until the Motion to Re-Open was heard on August 5, 2009. In fact, the issue was not even mentioned in the defendant’s Answer to the Motion to Re-Open filed on December 29, 2008. Therefore, the Court finds that this factor weighs heavily in favor of the State.

4. Prejudice to the Defendant

Finally, the Court addresses prejudice to the defendant. The three interests that the speedy trial right was designed to protect are considered when deciding the prejudice prong: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defendant’s defense will be impaired. *Id.* at 276.

The defendant in this case is not incarcerated pending trial. However, even if an accused is not incarcerated prior to trial, “he is still disadvantaged. . . by living under a

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cloud of anxiety.” *Barker*. 407 U.S. at 533. Although there has been no evidence presented that the defendant has suffered any undue anxiety, the presumption exists that the defendant has experienced some small amount of prejudice by anxiety due to the delay of his trial alone.

A significant additional consideration is the fact that the defendant has not argued that his defense has been impaired by the delay in going to trial and the Court finds that any impairment in his defense would be minimal. The State filed its Motion to Re-Open the case seven days after the Court dismissed the charges against the defendant, putting the defense on notice that this case could be reopened.

Due to the fact that (1) the defendant is not incarcerated; (2) that he has not appeared to have suffered any more anxiety than anyone else awaiting trial; and (3) that there is a lack of evidence of any impairment to the defense as a result of the delay of trial, the Court finds that, overall, the prejudice factor weighs in favor of the State.

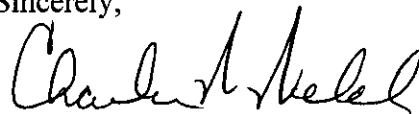
Having found that two *Barker* factors weigh in favor of the defendant and two factors weigh in favor of the State, the Court looks at the weight given to each factor in deciding whether the defendant’s speedy trial rights have been violated. *Harris*, 956 A.2d at 1278. Given the totality of the circumstances, the Court finds that the defendant’s speedy trial rights have not been violated by the delay in bringing his case to trial. The two factors weighing in the State’s favor greatly outweigh the two factors weighing in the defendant’s favor, especially given the fact that the defendant never asserted his right to a speedy trial before the August 4, 2009, oral argument for this motion.

CONCLUSION

The criminal action against the defendant should not have been dismissed by the Court pursuant to Court of Common Pleas Criminal Rule 48(b) since the State had filed an Information for the action in a timely manner. Additionally, after considering the *Barker* factors, the Court finds that the defendant’s right to a speedy trial has not been violated. Therefore, the State’s Motion to Re-Open the defendant’s case is GRANTED.

IT IS SO ORDERED THIS 6th DAY OF OCTOBER, 2009.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles W. Welch, III". The signature is fluid and cursive, with the first name "Charles" being the most prominent.

Charles W. Welch, III